No. 78-1548

IN THE

Supreme Court of the United States

October Term, 1978

CALIFORNIA BREWERS ASSOCIATION, *et al.*,
Petitioners,

v.

ABRAM BRYANT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 104 national and international labor unions, having a total membership of approximately 13,750,000 working men and women, with the consent of the parties, as provided for by Rule 42 of the Rules of this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Teamsters* v. *United States*, 431 U.S. 324, 352, this Court held that "the unmistakable purpose of § 703(h) [of the Civil Rights Act of 1964] was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII." And, in *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 82, the Court quoted *Teamsters'* statement of the purpose of § 703(h) with approval and continued:

> Section 703(h) is "a definitional provision; as with the other provisions of § 703, subsection (h) delineates which employment practices are illegal and thereby prohibited and which are not." *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 758 (1976). Thus, absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences.

In the present case a divided Court of Appeals held that § 703(h)'s protection is not applicable to section 4(a)(1) of the collective agreement, which provides that in order to become a "permanent employee", and thereby enjoy advantages over all other employees, one must have "completed forty-five weeks of employment under this Agreement * * * in one calendar year as an employee of the brewing industry in this State * * *". (A. 27) According to the majority of the court below:

> No comprehensive definition of "seniority system" is required to enable us to reject section 4(a)(1) as a seniority system, or as part of a seniority system, because, as will be shown, the provision lacks the fundamental component of such a system. Accordingly,

> we hold that section 4(a)(1) is not part of a seniority system, and therefore is not protected by section 703(h) against claims of nonintentional discrimination. [585 F.2d at 426.]

In that court's view the 45-week requirement was disqualified from protection under § 703(h) because "the brewery industry's 45-week requirement does not involve an increase in employment rights or benefits based upon the length of the employee's accumulated service" (*id*); thus, according to the lower court, because rights under the agreement do not "accrue automatically in the absence of resignation, termination, or transfer" (*id.* at 427) they are not seniority rights. We submit that the court below: 1) gave too narrow a reading to the statutory term "seniority system"; and 2) so misunderstood the agreement in question that it failed to recognize that the agreement satisfied the lower court's own constricted definition of "seniority system".

In Part I we show that the Court of Appeals misconstrued the term "seniority system" in § 703(h). That court did not consider the legislative history of that provision which shows its purpose, and which "contains no suggestion that any one [seniority] system was preferred." (*Teamsters, supra*, 431 U.S. at 355, n. 41.) And the lower court failed to examine "the conventional uses of the seniority system in the process of collective bargaining" which should govern construction of "seniority systems" in § 703 (h) as it did of the term "seniority" in veterans' preference legislation. (*Aeronautical Lodge* v. *Campbell*, 337 U.S. 521, 526.) Industrial practice shows that seniority systems are systems which base employment preferences on length of service, but are not limited to those systems which define seniority in accord with the employees' cumulative length of

service with the employer. Contrary to the Court of Appeals' approach the definitions of "seniority" in collective bargaining agreements "are almost too varied to enumerate." (Slichter, Healey and Livernash *The Impact of Collective Bargaining on Management* (1960), 116.) The essential constituent elements of a "seniority system" are "the criteria to be used in selecting the employees" (the seniority measure) and "the unit to be chosen" (the identification of the employees eligible to compete). The system "involves the interaction" of these elements. (*Id.* at 157). Each element takes many forms and the combinations created from them are myriad. Industrial practice shows specifically that there are countless agreements under which the employees' relative competitive seniority is not strictly a function of total length of employment within the unit of seniority, be it industry, plant, department, etc.; and that the court below was mistaken in stating that "seniority rights under a true seniority system usually accumulate automatically over time," (585 F.2d at 427). Thus, that court excluded from the statutory term "seniority system" a vast number of agreements which are entitled to the protection of § 703(h).

In Part II, we show that even if the Ninth Circuit's construction of § 703(h) were correct, it erred in holding that the system here did not satisfy the standards it declared. Although the Court of Appeals accepted the validity of the agreement's classification of employees as "permanent" and "temporary," the court believed the rule governing acquisition of "permanent" status—performance of 45 weeks' work within a calendar year—did not depend upon cumulative length of service. It did not examine the provisions of the agreement governing priorities for assignment *among* temporary employees, and simply assumed, incorrectly, that temporary employees are assigned arbitrarily. On the basis of that error, the court below mistakenly believed that length of service did not determine which temporary employee manages to secure 45 weeks' work in a single calendar year. In fact, priorities for assignment among temporary employees, and thus opportunities to secure 45 weeks' work in a single calendar year, are strictly a function of accumulated service.

In Part III we state briefly what we believe is the proper disposition of this case. Although the Court of Appeals erred in its construction of § 703(h), the district court erred in dismissing the complaint. For plaintiff alleged therein that the seniority system was improperly motivated; if that is so, the seniority system is excluded from protection by the proviso to § 703(h). Plaintiff is entitled to a remand to enable him to establish discriminatory motive.

ARGUMENT

1. *The Court Below Has Given an Impermissibly Narrow Construction to the Term "Seniority System" in § 703 (h) of the Civil Rights Act of 1964.*

A. Although § 703(h) "is directed toward defining what is and what is not an illegal discriminatory practice" (*Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 761; see *Hardison, supra,* 432 U.S. at 82, quoted at p. 2, *supra*), Congress did not further define the provision's key operative term "seniority system." The legislative history shows that "[t]hroughout the initial consideration of H.R. 7152, later enacted as the Civil Rights Act of 1964, critics of the bill charged that it would destroy existing seniority rights," that protection of those seniority rights was a matter of great and general concern, and that § 703(h) was added to the bill in order to make double sure the assurances given

by the sponsors of Title VII that its enactment would not have an adverse affect on existing seniority rights. (See *Teamsters,* 431 U.S. at 350-352; *Franks,* 424 U.S. at 759-761.) Moreover, the *Teamsters* Court, in concluding that "[t]here is no reason to suppose that Congress intended in 1964 to extend less protection to legitimate departmental seniority systems than to plantwide seniority systems," recognized:

> Then, as now, seniority was measured in a number of ways, including length of time with the employer, in a particular plant, in a department, in a job, or in a line of progression. See Aaron, Reflections on the Legal Nature and Enforceability of Seniority Rights, 75 Harv. L. Rev. 1532, 1534 (1962); Cooper & Sobol, Seniority and Testing under Fair Employment Laws; A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv. L. Rev. 1598, 1602 (1969). The legislative history contains no suggestion that any one system was preferred. [431 U.S. at 355, n. 41.]

To be sure, this conclusion does not resolve entirely the meaning of the term "seniority system", which was used in the opinion as in the statute. But it does provide a lesson of great importance for our immediate purposes. The *Teamsters'* footnote emphasized the significance of existing industrial practice in determining the scope of § 703(h). It is at least implicit in that statement, and is certainly necessary to accomplish the avowed objective of § 703(h), that this provision encompasses all *bona fide* agreements which create employee seniority rights. In this respect, *Teamsters* employed the methodology spelled out by the Court when it was confronted with the identical problem of construction of the term "seniority" in veterans' preference legislation:

> In providing that a veteran shall be restored to the position he had before he entered the military service "without loss of seniority," § 8 of the Act uses the term "seniority" without definition. It is thus apparent that Congress was not creating a system of seniority but recognizing its operation as part of the process of collective bargaining. We must therefore look to the conventional uses of the seniority system in the process of collective bargaining in order to determine the rights of seniority which the Selective Service Act guaranteed the veteran. [*Aeronautical Lodge* v. *Campbell,* 337 U.S. 521, 526.]

As Mr. Justice Frankfurther stated in another context, "The recognized practices of an industry give life to the dead words of a statute dealing with it". (*United States* v. *Maher,* 307 U.S. 148, 155.)

B. The Court of Appeals did not find its definition of "seniority system" in the statutory language as such and that court did not refer to the legislative history. (In the latter respect, we think that court erred for it gave no weight whatsoever to the clearly expressed purpose of § 703(h). (See pp. 5-6, *supra*).) Rather, the court below derived the meaning of the statutory phrase entirely from a single sentence in an article: "Seniority is a system of employment preference based on length of service; employees with the longest service are given the greatest job security and the best opportunities for advancement". (Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights,* 75 Harv. L. Rev. 1532, 1534 (1962), quoted at 585 F.2d at 426.) The Court of Appeals drew therefrom the rigid notion that "service" must mean all service with the employer, and that seniority rights must "accrue automatically". Given the nature of the statutory issue herein, that court appropriately looked to a recognized student of labor relations; indeed, this Court in *Teamsters* cited the same article,

and another, in describing the nature of seniority systems. (See 431 U.S. at 355, n. 41, quoted at p. 6, *supra.*) But the Court of Appeals misunderstood what Professor Aaron wrote and thus gave to the term "seniority" a meaning far more restrictive than that term has in the real world of collective bargaining and in the statute.

In the paragraph immediately following that from which the Court of Appeals quoted, Professor Aaron wrote:

> Seniority provisions assume an almost infinite variety and are constantly being altered and reinterpreted to meet changing or unforeseen situations. For the purposes of this discussion it is unnecessary to review the different types, which range from absolute rigidity to great flexibility, and from relative simplicity to extreme complexity. [Aaron, *supra,* 75 Harv. L. Rev. at 1534. (This appears to be the passage referred to by the citation in *Teamsters, supra.*)]

The leading treatise on collective bargaining practices states:

> Up to this point the word seniority has been defined arbitrarily as an employee's length of continuous service with the company. This broad definition is reasonably accurate insofar as eligibility for benefit programs is concerned. It serves well in the application of benefit seniority. However, the definition may be entirely inadequate and misleading for those items involving the use of competitive status seniority to determine order of layoff, recall, promotion, and other preferential treatment. For these areas the definitions are almost too varied to enumerate.
>
> A distinction should be made between the "unit" of seniority or its scope of application, and the measurement of, or ranking by, seniority. The need for this distinction will be recognized in Chapter 6 "Layoff and Work-Sharing Arrangements" and in Chapter 7 on the subject of "Promotions." For example, the phrase "departmental seniority" could have one or both of two meanings. It might mean that the least senior worker in a particular department will be the first laid off, yet ranking in the department might be based on total service with the company. In this sense, the term "departmental seniority" refers to the unit for purposes of applying seniority. Or the term may refer to the measurement of seniority; that is, the employees within the department will have their relative status determined by their length of service in the department. It could mean both if the measurement is based on the unit of application.
>
> The scope of the seniority unit and the measurement of service vary according to the use to which the seniority criterion is being put. In the case of benefit seniority it is usually length of continuous service with the company. But where competitive job rights are at stake, there may well be one scope-measurement amalgam for temporary layoffs, another for permanent layoffs, another for promotions, and still others for different preferential treatments to be accorded senior employees. To illustrate, a broad unit is likely to apply in the case of layoffs, thus enhancing the chance of a senior man to be retained during a period of work curtailment. In the case of promotion a narrow unit is more likely to govern. [Slichter, Healy and Livernash, *The Impact of Collective Bargaining on Management* (1960) 116-17 [1]]

[1] Sumner Slichter, Lamont University Professor at Harvard University (and, *inter alia*, President of the American Economic Association) was the most distinguished labor relations scholar of his day. *The Impact of Collective Bargaining on Management* represents the culmination of his life-long study of the collective bargaining system. This treatise devotes 107 pages to the discussion of variations in seniority systems. (*Id.* 104-210.)

This Court has recognized the variety of seniority systems both in terms of the measure used and the unit of employees entitled to compete on the basis of that measure. In *Aeronautical Lodge, supra,* the Court said:

> Barring legislation not here involved, seniority rights derive their scope and significance from union contracts, confined as they almost exclusively are to unionized industry. See *Trailmobile Co.* v. *Whirls,* 331 U.S. 40, 53, n. 21. There are great variations in the use of the seniority principle through collective bargaining bearing on the time when seniority begins, determination of the units subject to the same seniority, and the consequences which flow from seniority. All these variations disclose limitations upon the dogmatic use of the principle of seniority in the interest of the ultimate aims of collective bargaining. Thus, probationary conditions must often be met before seniority begins to operate; sometimes it becomes retroactive to the date of employment; in other instances it is effective only as from the qualifying date; in some industries it is determined on a company basis, in others the occupation or the plant is taken as the unit for seniority determinations; sometimes special provisions are made for workers in key positions; and then again these factors are found in varying combinations. See Williamson & Harris, Trends in Collective Bargaining, 100-102 (1945); Harbison, Seniority Policies and Procedures as Developed through Collective Bargaining 1-10 (1941). [337 U.S. at 526-527.]

Again, in *Ford Motor Co.* v. *Huffman,* 345 U.S. 330, 338-339, the Court said:

> Compromises on a temporary basis, with a view to long-range advantages, are natural incidents of negotiation. Differences in wages, hours and conditions of

> employment reflect countless variables. Seniority rules governing promotions, transfers, layoffs and similar matters may, in the first instance, revolve around length of competent service. Variations acceptable in the discretion of bargaining representatives, however, may well include differences based upon such matters as the unit within which seniority is to be computed, the privileges to which it shall relate, the nature of the work, the time at which it is done, the fitness, ability or age of the employees, their family responsibilities, injuries received in course of service, and time or labor devoted to related public service, whether civil or military, voluntary or involuntary. See, *e.g., Hartley* v. *Brotherhood of Clerks,* 283 Mich. 201, 277 N.W. 885; and see also, Williamson & Harris, Trends in Collective Bargaining (1945), 100-103.

While there is great variety, there is also a measure of consistency. As Professor Aaron states, "seniority is a system of employment preference based on length of service" (Aaron, *supra,* 75 Harv. L. Rev. at 534). It is true that systems of employment preference *not* so based are *not* recognized as "seniority systems". Thus, to extent the Court of Appeals excluded "an academic degree requirement" and "merit promotion" it was correct. (585 F.2d at 427, n. 11.) But, as Professor Slichter and his colleagues add, to equate competitive status seniority with "the employees' length of continuous service with the company," is "entirely inadequate and misleading". For the "definitions are almost too varied to enumerate." (Slichter, *et al., supra,* 116.) Thus, those careful students of the field would go no further than to state that competitive status seniority systems include both a " 'unit' of seniority or its scope of application" and a "measurement of, or ranking by seniority" (*id.*); *viz.,* both a rule (or rules) defining the class of employees en-

titled to compete and a rule (or rules) defining "service" that will be taken into account in resolving that competition.

These are the essential constitutent elements of a "seniority system." Such a system "involves the interaction" of "the criteria to be used in selecting the employees" (the seniority measure) and "the unit to be chosen" (the identification of the employees eligible to compete). (*Id.* at 157). Each of these elements takes many forms and the combinations created from them are myriad. That is why seniority systems are as varied as American industry and are flexible enough to meet its varied needs.

C. We turn now to the particular characteristics which the court below determined are necessary to the existence of a "seniority system" within § 703(h): the "increase in employee rights or benefits [must be] based upon the length of the employee's accumulated service" (585 F.2d at 426); and those rights must "normally accrue automatically in the absence of resignation, termination or transfer" (*id.* at 427). We show that these court-imposed requirements do not correspond with "the conventional uses of the seniority system in the process of collective bargaining." (*Aeronautical Lodge, supra,* 337 U.S. at 526.)

One need not look further than the decisions of this Court to recognize that this is so. In *Ford Motor Co.* v. *Huffman, supra,* this Court held that a union did not breach its duty of fair representation by awarding veterans of World War II artificial seniority credit for their period of military service, notwithstanding that that military service predated the employees' initial date of hire with the Company. The Court recognized that the effect of this provision was that employees with greater *actual* service were "in some in-

stances * * * now surpassed *in seniority* by employees who entered the employ of Ford after they did but who are credited with certain military service which they rendered before their employment by Ford." (345 U.S. at 335 (emphasis added).) But, the Court concluded, nothing in the National Labor Relations Act

> compel[s] a bargaining representative *to limit seniority clauses solely to the relative lengths of employment of the respective employees.* [*Id.* at 342 (emphasis added).]

In this regard, the Court cited a 1949 compilation of collective bargaining agreements by the Department of Labor which "quotes many seniority clauses as examples of those then in use and including many factors other than length of employment." (*Id.* at 341 n. 11.[2])

In *Aeronautical Lodge, supra,* the Court dealt with a collective bargaining agreement which declared that "Union Chairmen who have acquired seniority shall be deemed to have top seniority so long as they remain Chairmen." (337 U.S. at 523.) The suit involved a challenge by returning veterans that this provision, first negotiated while they were away in military service, violated the command of the selective Service Act that returning veterans be "restored without loss of seniority," for it resulted in their layoff while employees previously junior to them were retained. The court of appeals had invalidated the provision, concluding

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[2] The Court also cited certain principles evolved by a committee appointed by the Department of Labor, among them the principle that newly hired veterans "should be allowed *seniority credit,* at least for purposes of job retention, equal to time spent in the armed services plus time spent in recuperation from service-connected injuries or disabilities either through hospitalization or vocational training." (*Id.* at 341 (emphasis added).)

that "the Act forbade disregard of length of service, so far as veterans are concerned." (*Id.* at 525.) This Court reversed, declaring:

> *To draw from the Selective Service Act an implication that date of employment is the inflexible basis for determining seniority rights as reflected in layoffs is to ignore a vast body of long-established controlling practices in the process of collective bargaining of which the seniority system to which the Act refers is a part.* One of the safeguards insisted upon by unions for the effective functioning of collective bargaining is continuity in office for its shop stewards or union chairmen. To that end provision is made, as it was made here, against laying them off merely on the basis of temporal seniority. Because they are union chairmen they are not regarded as merely individual members of the union; they are in a special position in relation to collective bargaining for the benefit of the whole union. To retain them as such is not an encroachment on the seniority system but a due regard of union interests which embrace the system of seniority rights. [*Id.* at 527 (emphasis added).]

In *Franks* v. *Bowman Transportation Co., supra,* 424 U.S. at 747, this Court approved the conferral of "rightful place" seniority upon those who would have obtained jobs earlier but for the employer's timely-challenged post-Act discrimination, describing this remedy as "seniority relief."[3] Further this Court recognized the right of parties in collective bargaining to award artificial seniority to victims of past discrimination even where not required to

[3] In his partial dissent, Justice Powell described the effect of this remedy:

> [T]he discrimination victim is placed ahead of others not because of time actually spent on the job but 'as if' he had worked since he was denied employment. This also requires an assumption that nothing would have interrupted his employment, and that his performance would have justified a progression up the seniority ladder. [*Id.* at 793.]

do so by Title VII (*e.g.* if the discrimination occurred prior to the effective date of the Act, or was post-Act but not timely challenged), in order to place them in their "rightful place":

> The Court has * * * held that a collective-bargaining agreement may go further, enhancing *the seniority status* of certain employees for purposes of furthering public policy interests beyond what is required by statute, even though this will to some extent be detrimental to the expectations acquired by other employees under the previous seniority agreement. *Ford Motor Co.* v. *Huffman,* 345 U.S. 330 (1953). And the ability of the union and employer voluntarily to modify *the seniority system* to the end of ameliorating the effects of past racial discrimination, a national policy objective of the 'highest priority', is certainly no less than in other areas of public policy interests. [*Id.* at 779 emphasis added).]

This Court thus has repeatedly recognized that a "seniority system", as that term is commonly used in labor relations, may depart from strict length of service by providing artificial enhancements to some employees, beyond their accumulated length of service, for certain purposes.[4] And while no case before this Court has involved the other side of that coin—limitations upon the accumulation of seniority —such limitations are also a frequent phenomenon in labor relations.

A Department of Labor study of agreements covering 8.2

[4] For other instances of enhanced seniority beyond length of service see U.S. Dept. of Labor, Bulletin No. 908-11 (1949), 10.

million workers (U.S. Dept. of Labor, Bulletin 1425-14, *Administration of Seniority* (1972), 1) discloses that 90% of the collective bargaining agreements containing "seniority systems" provide that an employee will lose (or "break") his seniority in specified circumstances. (*Id.* at 25.) "The most frequently encountered condition for loss of seniority, cited in nearly three-quarters of the agreements mentioning seniority was expiration of recall rights following a layoff. Depending on the agreement, the period before seniority was lost ranged from less than a year to 10 years." (*Id.* at 26.) Most agreements provide that employees rehired following a loss of seniority "must start as new employees * * * and receive no credit for seniority acquired in their previous employment." (*Id.* at 30.) Thus, it is not uncommon for one employee to have less "seniority" than another even though he has devoted a greater number of years of service to the employer; if his service was broken in the middle by an extended layoff, he started anew when rehired.

This same phenomenon results from any other contractually specified ground for breaking service. Among the most common ones identified in the DOL study were these:

"*Failure to report back from layoff*": Where an employee is recalled from work *before* his service has broken, but fails to report within a specified time, "almost 70 percent of the seniority provisions" declared that service would break. (*Id.* at 26-27.)

"*Leave of Absence*": Nearly 40% of the agreements provided that an employee who failed to return promptly at the conclusion of an approved leave of absence would break service. (*Id.* at 27.)

"*Medical leave*": 17% of the agreements provided that service would break after "prolonged absence for medical reasons." (*Id.* at 28.)

"*Violations of the terms of a leave of absence*": "[M]ore than a quarter of the seniority provisions . . . stipulated that an employee violating the terms of his leave of absence would lose his seniority." (*Id.* at 28.) Most of these made it such a violation for the employee to work elsewhere during his leave of absence. (*Id.*)

"*Unreported or unexcused absence*": More than one-third of the seniority provisions "provided for loss of seniority for unexcused or unreported absence" — usually specifying 3 to 10 days as the period of absence triggering the service break. (*Id.*)

"*Transfer out of the bargaining unit*": "[I]t is common for persons transferring out of the bargaining unit—most often to supervisory jobs—to lose their seniority." (*Id.* at 29.)

In each of these instances (and in others specified in some agreements) employees' relative competitive seniority is not strictly a function of total length of employment. Yet no one would suggest that such provisions—found in 90% of all seniority agreements—render the systems containing them not "seniority systems". In this regard, it is significant that these provisions are described in a DOL study entitled "Administration of Seniority", and that the chapter describing them begins by describing them as features of "seniority systems." (*Id.* at 25).

Apart from factors which "break" service altogether, "collective bargaining agreements may specify conditions in which regular employees are subject to reduction in se-

niority ranking." (*Id.* at 21.) It is "relatively common," for example, that an employee who foregoes an opportunity to take a job to which his seniority would entitle him forfeits relative competitive standing to the junior employee who takes that job, or forfeits the right to obtain a similar job for a specified time period, or, more rarely, suffers a permanent reduction in his status on the seniority list. (*Id.*) These phenomena, which the Department of Labor described under the heading "Modification of Seniority" (*id.*), have never been understood to render the system not a "seniority system".

The Court of Appeals cited nothing to support its statement that "seniority rights under a true seniority system usually accumulate automatically over time * * *." (585 F.2d at 427.) That court's view is erroneous. The records of two cases in this Court show that the parties to the seniority arrangements there at issue recognized that accumulation of seniority is so far from automatic that they expressly provided a procedure for resolution of disputes on this subject. In *Teamsters* itself Article 5 of the Agreement, which dealt with seniority, contained a section 7 which provided:

> The parties acknowledge that the above rules are intended solely as general standards and further that many factual situations are presented to Committees which necessitate modification or amendment. Accordingly, the Employers and Unions acknowledge that questions of *accrual*, interpretation or application of seniority rights may arise which are not covered by the general rules set forth. Accordingly, it is understood that the Employers and Unions jointly involved, and/or the respective grievance committees may mutually agree to such disposition of questions of seniority which in their judgment is appropriate under the circumstances. The Change of Operations Committee provided in the National Master Freight Agreement or the Supplemental Agreements shall have the authority to determine the establishment and application of seniority in those situations presented to them. In all cases the seniority decisions of the Joint Committtes, including the Change of Operations Committees and Subcommittees, established by the National Master Freight Agreement and the respective Supplemental Agreements shall be final and binding. [R. Nos. 75-636 and 75-671, Vol. III, pp. 812-813 (emphasis added).]

And the seniority agreement in *Humphrey* v. *Moore*, 375 U.S. 335 provided:

> In the event that the Employer absorbs the business of another private, contract or common carrier, or is a party to a merger of lines, the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the Employer and the Unions involved. Any controversy with respect to such matter shall be submitted to the joint grievance procedure. [*Id.* at 338. See also *id.* at 337-338, 345-347.]

In sum, when the court below declared absolute accumulation of length of service to be "[t]he fundamental component of a seniority system" (585 F.2d at 426), it was inventing a standard wholly foreign to the world of collective bargaining. A reliance upon length of service is, indeed, the quality which distinguishes seniority systems from other systems of employee selection, but as this Court has twice recognized, collective bargaining has never made *absolute* accumulation of length of service the funda-

mental component of such systems. (*Ford Motor Co. supra*, 345 U.S. at 342; *Aeronautical Lodge, supra*, 337 U.S. at 527.)

The court below, by confining the term "seniority system" in § 703(h) to pure cumulative length of service, thus ignored "the conventional uses of the seniority system in the process of collective bargaining" (*Aeronautical Lodge, supra*, 337 U.S. at 526), and disregarded "the widespread acceptance and relevance" (*Ford Motor Co., supra* 345 U.S. at 343) of seniority systems which use a different measure of service. That court thereby departed from the standard which governs construction of § 703(h) (see point A, *supra*). In place of that standard, the court below substituted its own notions of industrial justice. While that is in any event an impermissible approach to construing § 703(h), it is instructive to observe how wide of the mark the notions of the court below are, when compared to those which in fact inform "the process of collective bargaining."

D. The court below confined § 703(h) to those systems which adhere absolutely to cumulative service, because it believed that the lone value of seniority systems is rewarding long and faithful service to the employer. In fact, that equity is but one of a number of values—reflecting the diverse interests of the parties at the collective bargaining table—which are involved in, and ultimately compromised in, the parties' agreement on a particular seniority system.

Seniority systems have resulted principally from union insistence.[5] It is generally agreed that three considerations led to the evolving, and now virtually universal, union desire for adoption of seniority systems: (1) they remove

[5] *Aeronautical Lodge, supra*, 337 U.S. at 526; Cooper & Sobol, *Seniority and Testing under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 Harv. L. Rev. 1598, 1604 (1969); U.S. Dept. of Labor, Bulletin 1425-11, *supra*, 1.

job assignments from management discretion, thereby eliminating factors such as personal favoritism, nepotism, prejudice, and other subjective considerations which employees considered unfair determinants of selection; (2) they replace that management discretion with an objective criterion which eliminates disputes between employees as to relative entitlement and enables employees to predict their present and future employment prospects vis-a-vis other employees; and (3) by virtue of their objectivity, they provide unions an automatic basis for determining which employee's claim to a job should be supported, and thus eliminate the weakening of union cohesiveness which would ensue were the union called upon in each instance to pick and choose among its members' competing claims to a job under less automatic criteria.[6]

These interests in objectivity and predictably might have been served by the adoption of criteria for selection other than seniority, e.g. age, alphabetical order, or drawings in a lottery. That seniority was the universally-chosen criterion reflects, of course, that length of service has been deemed the most equitable of the possible objective criteria.[7] But even the choice of length of service, from among the possible objective criteria, has reflected a complex of employee interests and not simply rewarding long service.

[6] Slichter et al., *supra*, 104-105; Cooper & Sobol, *supra*, 82 Harv. L. Rev. at 1604-05; Stacy, *Title VII Seniority Remedies in A Time of Economic Downturn*, 28 Vand. L. Rev. 487, 488-489 (1975).

[7] Slichter et al., *supra*, 104.

If that had been the sole employee interest, unions invariably would have sought the broadest possible seniority measure: industry service, or at least company or plant service. That unions often have championed narrower seniority systems (e.g. departmental, unit, line of progression, or job) is the result of weighing competing employee interests—e.g., the desire of incumbents to be free of the risk of displacement by senior employees coming from other parts of the plant, and the desire for greater predictability which flows from employees in a unit knowing that more senior employees elsewhere in the plant cannot jump ahead of them in promotional situations. These interests are distinct from, indeed in some instances antithetical to, the equity of rewarding long service. A union which champions a departmental seniority system is not responding to the view that one day's work in a department is more equitably "deserving" of reward than ten years' service elsewhere in the plant; rather, it is responding to the reality that the matrix of *all* employee interests has made the proffered system the most desirable compromise. As Professor Slichter and his colleagues recognized, (Slichter *et al., supra,* 140), the formulation of the rules themselves requires the compromise of a great variety of competitive interests among union members."[8]

Of equal importance, seniority systems are not decreed by unions and employees alone. A union's assessment of the seniority system which best accommodates the conflicting interests of the employees it represents enables it to formulate the proposal it will bring to the bargaining table,

[8] See also Aaron, *supra,* 75 Harv. L. Rev. at 1535.

but it does not determine what system will emerge from the collective bargaining process. For the employer, too, has a vital stake in the shape of the seniority system. As explained in U.S. Dept. of Labor, Bulletin 908-11, *Collective Bargaining Provisions—Seniority* (1949), 14:

> "Management customarily prefers narrower seniority units, preferably by job classification or department, in order to establish competition between the same skills, to prevent excessive displacement of workers and numerous transfers from one department to another, and to eliminate high training costs. The types of seniority incorporated in agreements probably reflect attempts to reconcile the view that the wider unit gives the greatest protection with the belief that some kind of limitation on departmental, occupational, or geographic lines is necessary for productive effciency."[9]

Thus, "the conventional uses of the seniority system in the process of collective bargaining" (*Aeronautical Lodge,* 337 U.S. at 526) have not been confined, as the court below thought, solely to rewarding long and faithful service. They have, rather, accommodated that value with others deemed important by employees, and, ultimately, with others deemed important by management.

There is nothing in the legislative history to suggest that Congress, in adopting § 703(h), meant to protect only those seniority systems which reward long service to the total exclusion of the other values which such systems customarily serve. Indeed, had Congress' focus been that limited,

[9] See also, Slichter et al., *supra,* 167, 192-193; U.S. Dept. of Labor, Bulletin 1425-11, *Seniority in Promotion and Transfer Provisions* (1970), 11.

it would not have extended protection to narrower seniority systems which compromise the reward of long service in order to effectuate other employee and management interests. Rather, as this Court found in *Teamsters*, the concern which actuated Congress was that employees' expectations arising out of their existing seniority systems, *whatever their terms*, not be disturbed by the enactment of Title VII so long as those systems were not discriminatorily motivated. (431 U.S. at 352-354, 355 n. 41.) This may have reflected a positive preference on Congress' part to insulate innocent employees from this particular consequence of past employer discrimination (*id.* at 352-353); or it may have reflected a less value-laden fact of legislative life, the recognition by Title VII's sponsors that assurance of stability to America's workers was necessary to "clear[] the way for the passage of Title VII" (*id.* at 352). Whichever prompted the Congressional decision, the decision itself is clear: Congress insulated all innocently-motivated "seniority systems" as that term is understood in collective bargaining; Congress did not limit its protection to those systems built upon any particular set of underlying value schemes. There is, accordingly, no justification for construing § 703(h) not to protect the vast majority of seniority systems which, through the compromise of many divergent employee and management interests, depart from the pristine model demanded by the Ninth Circuit.[10]

E. We believe that it is incumbent on us to point out that

[10] In the discussion above, we have noted that management concerns affect the shape of the seniority system emerging from collective bargaining. Those management concerns also result, frequently, in the collective bargaining agreement affording the employer some leeway to override seniority in making specific decisions. For example, agreements often provide that the "senior" employee (however defined) will be entitled to a promotional opportunity so long as he has the ability to perform the job to which he seeks promotion, but that the employer may deny promotion to the senior employee if it determines that such employee lacks the requisite ability. (Slichter *et al.*, *supra*, 198-99; U.S. Dept. of Labor, Bulletin 1425-11 (1970), 7-10.) This case does not present the question whether employer decisions which *override* seniority are themselves protected by § 703(h). It is our view that they are not, *viz*, that a decision to *bypass* the employee whose seniority (however defined) gives him first claim to a job is a decision to be measured by Title VII's commands exclusive of § 703(h), and that a judicial determination that that decision was made upon grounds violative of those commands would entitle the employee to his "rightful place," *viz*, to the job to which his seniority would have entitled him but for the employer's unlawful decision to override seniority. (*Frank* v. *Bowman Transportation Co.*, *supra*.)

the interpretation of § 703(h) advanced here demonstrates not only that the court below erred in this case but also impeaches the analysis in *Parson* v. *Kaiser Aluminum Corp.*, 575 F.2d 1374 (C.A. 5), *amplified on denial of rehearing*, 583 F.2d 132, *cert. denied*, 47 L.W. 3761; *Pettway* v. *American Cast Iron Pipe Co.*, 576 F.2d 1157, 1193-1200 (C.A. 5), *cert. denied*, 47 L.W. 3482; and *Patterson* v. *American Tobacco Co.*, 586 F.2d 300, 303, 305-306 (C.A. 4).[11]

This case concerns one of the two basic elements of seniority systems—the *measure* of seniority. *Parson*, *Pettway*, and *Paterson* concerned the other basic element of such systems—the definition of the employees eligible to compete using the measure chosen. The latter decisions

[11] While we believe that each of these decisions wrongly construed the term "seniority system", we express no view as to whether the results reached might have been justified on other grounds in light of the particular facts. (See *Teamsters*, *supra*, 431 U.S. at 346, n. 28.)

held that § 703(h) protects only the measure of seniority, and not the determination of the employees eligible to compete. But as we have shown above (pp. 8-12), seniority systems are universally understood in the collective bargaining world to encompass both elements.

The untoward results which flow from the failure of these courts to accord § 703(h) its full scope are most easily demonstrated from a consideration of the facts in *Parson*. The parties there had decided that opportunities to promote within a department should be limited to those already working in that department. However, instead of using length of service within the department as the seniority measure, they used length of service in the plant. The Fifth Circuit ruled that § 703(h) protected the parties' choice of plant service as the seniority measure, but not their decision to confine promotional opportunities to those within a department. Thus, as the system did not allow all employees in the plant to compete on the basis of plant service for promotions within a department, it was not protected by § 703(h). (575 F.2d at 1380-81, 1387-89; 583 F.2d at 133.)

The incongruity of this ruling is apparent. Had the parties chosen departmental service as the seniority measure, the Fifth Circuit would have found the system protected by § 703(h), although it would equally have limited promotional opportunities to those within the department (for those outside the department would not have had such seniority). The system actually chosen was more beneficial to those outside the department, for while it equally required that they enter a new department only through a job not desired by those already in the department, once there

they could exercise plant seniority in bidding for future promotional opportunities. Yet the parties were punished—their system was denied § 703(h) protection—because they had elected to provide this greater benefit.

The ruling is more than incongruous, however; it constricts the meaning of "seniority system" in a manner unknown to the collective bargaining world. One of the traditional seniority patterns is "seniority applied by department but computed on the basis of total plant or company service." (U.S. Dept. of Labor, Bulletin 908-11, *Collective Bargaining Provisions-Security* (1949), 15.) Indeed, in 1960, Professor Slichter and his colleagues observed, and applauded, the:

> trend * * * toward the use of a single seniority date, usually the date of hire in the company or the plant, regardless of the units of seniority application. Ranking *within any given unit* by date of original hire in the company is becoming more prevalent. [Slichter *et al., supra,* 117 (emphasis added).]

By divorcing the measure of competition from the unit of competition, and extending § 703(h) protection only to the former, these courts have committed the "common error" of those unfamiliar with collective bargaining: the "failure to think in terms of the total system." (*Id.* at 154.) That error was avoided in the decisions of other lower courts which have correctly concluded that § 703(h) protects not only the measure of seniority, but also the definition of those eligible to compete. (*Alexander* v. *Aero Lodge No. 1735,* 565 F.2d 1364, 1378-79 (C.A. 6); *Croker* v. *Boeing Co. (Vertol Div.),* 437 F. Supp. 1138, 1186-88 (E.D. Pa. 1977).)

II. Even on the Restrictive Construction of § 703(h) Adopted Below—the System Here Was Entitled to § 703(h) Protection; In Holding Otherwise, the Court Below Misunderstood the System.

A. In the instant case, the court below found § 703(h) inapplicable because it did not believe the unit of measure under challenge—the requirement of 45 weeks' service in a calendar year—is a "seniority" unit of measure. In that court's view, only those systems which credit *all* service, and which therefore prefer the employee with the greatest *cumulative* length of service, constitute "seniority" systems. The present system falls short, the court below concluded, because the system would permit a cumulatively-junior employee to achieve "permanent" status (i.e. completion of 45 weeks in a *single* calendar year) ahead of a cumulatively-senior employee. The lower court's analysis is legally deficient; as just shown § 703(h) is not limited to total accumulation seniority systems. But even if § 703(h) were so limited, that court has erred in believing that the agreement here establishes a non-cumulative system. To put it gently, the court below did not understand the system it condemned.

B. The brewery industry is a seasonal industry: beer sales are highest from spring to fall, and taper off in the winter. As in every seasonal industry, this produces a duality with respect to employment opportunities: a certain number of employees are needed year-round; an additional number are needed only during the peak season.

A traditional response of unions in seasonal industries has been to create two seniority "tiers"—one for year-round ("permanent") employees, the other for peak-season

("temporary") employees—as a means for limiting the number of employees enjoying "permanent" status. (Slichter *et al., supra,* 124). By holding the number of "permanent" employees to roughly the number of year-round vacancies, the union escapes the necessity either for "work sharing" during the off-season (which results in all permanent employees receiving less than a full week's wage) or inevitable layoffs of "permanent" employees during the off-season (rendering "permanent" status illusory). It is common, therefore, to find seniority systems in seasonal industries which make acquisition of permanent status extremely difficult. (*Id.*)

A practice closely parallel to that of petitioners here was followed in the mail rooms of New York city newspapers as disclosed by the record in *Labor Board v. News Syndicate Co.,* 365 U.S. 695, *affirming* 279 F.2d 323 (C.A. 2). Even as the brewery industry's output changes senasonally, so the size of newspapers, and thus the need for mailroom personnel, differs substantially within each week, being especially heavy on the two evenings (Friday and Saturday) on which the Sunday paper is distributed.

The hiring practices of the New York Daily News were described by this Court as follows:

> The minimum mailing-room staff ("regular situation holders") are both union members and journeymen; they report for work each night and are not required to "shape." To fill in vacancies and to meet added needs, the foreman next turns to "regular substitutes," who are both journeymen and union members. Next in line of priority are those the Board insists are referred to as "outside card men," but who are at any rate both journeymen and union members regularly shaping up for other newspapers, but available for work on the

> News. The lowest priority category consists of what the Board calls "nonunion shaper" (and the union, "non-journeymen casuals"); at any rate, these men have neither union membership nor journeymen status. Within the category, such men are ranked in seniority running from the date of first shaping up for the News. [365 U.S. at 701, n. 3]

Thus, there were employees with permanent status at the News and in the industry (journeymen) and those without (casual workers); those in the former category (which had its own sub-categories) had an absolute preference over those in the latter, and different seniority ("priority") lists were kept for each category. Like that of the brewery industry here, the system utilized both service with a particular employer and within the industry as measures of seniority. (See also 279 F.2d at 331.) The parallel is striking also in that there, as here, the change of status depended not on a casual employee's ranking on the seniority list of casual employees, but on the amount of work he had performed. The union and the employer agreed:

> to put into the class of a "regular substitute" those extras who in the prior two years had earned 15 vacation credits, which was another way of describing those who had averaged about three days' work a week. [365 U.S. at 700-701.]

The charging party in *News Syndicate,* Randall, did not qualify under this standard, although at the time he was first on the list of casuals on the basis of the date that he first sought employment at the *News.* (See, *id.*, n. 3).

Similarly, in the shipping industry there are three separate classes of employees "A", "B" and "C"; "A" employees have automatic preference with regard to hire over

"B" employees, and "B" over "C". Within each class job opportunities are awarded on the basis of a priority defined in the agreement. But in order for a "C" seaman to advance to "B" status he must have worked for a specified amount of time (90 days) during each of 8 consecutive years; all accumulated employment credit toward "B" status is lost if, in any year, the seaman is employed for less than 90 days.[12]

Consistent with this pattern the agreement in this case is carefully structured so that additional employees achieve "permanent" status only as the need for additional year-round employees arises, *viz.*, when there is an increase in the size of the year-round workforce, or when existing permanent employees vacate their jobs(e.g., through retirement, quit, transfer to other jobs, or promotions to supervisory status). To accomplish this limitation on the number who will ascend to permanent status, the agreement sets the eligibility criterion for ascendancy to that status at a level too high to be achieved simply by working during the peak season. The eligibility criterion is 45-weeks in a calendar year, a period longer than the peak season, and thus one which will not automatically elevate seasonal workers to "permanent" status even if they return each year for peak-seasonal work. Only as work opportunities open up on a year-round basis is it possible for employees to meet the 45-week criterion and achieve permanent status.

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[12] As an appendix hereto we set out excerpts from the "Shipping Rules" of the "New Standard Freightship/Passenger Agreement between Seafarers International Union, Atlantic, Gulf, Lakes and Inland Waters District, AFL-CIO and contracted companies (June 16, 1978-June 15, 1981)," which codify the seniority system described in the text.

C. The court below concluded that the measure which determines who *becomes* a "permanent" employee is not a "seniority" measure because it is not geared to cumulative length of service. And it is here that the Court of Appeals' failure to understand the system betrayed it, for even on its own restrictive construction of § 703(h) the measure here is cumulative length of service.

The Court of Appeals' misunderstanding flowed from its failure to examine the provisions of the agreement regulating competition *among* temporary employees. That court apparently assumed that assignments of temporary employees were made arbitrarily—or at least not on the basis of seniority—so that it was pure happenstance (and not a function of cumulative service) that determined which temporary employee would be employed for 45 weeks in a calendar year and thereby obtain permanent status. In fact, the determination of which temporary employee works 45 weeks in a calendar year is strictly a function of cumulative length of service.

The agreement covers a number of separate plants in the brewery industry in California. Temporary employees accrue two measures of seniority: (1) industry service, which represents the employee's total accumulated length of service at all plants covered by the agreement, and (2) plant service, which represent the employee's total accumulated length of service at a particular plant.[13]

At each plant, work opportunities for temporary employees are awarded on the basis of plant seniority; thus, the temporary employee with the greatest accumulated

[13] As is true in most collective bargaining agreements (see pp. 15-17, *supra*), seniority "breaks" (i.e. is lost) by absence from work

length of plant service will always have the first opportunity to secure work not done by permanent employees, and will always be the first temporary employee at that plant able to secure 45 weeks' work in a year and thereby qualify for "permanent" status. If work is available at a plant which is not claimed by permanent employees, and there are no temporaries with plant service available for work at that plant, the union must dispatch the temporary employee awaiting assignment with the greatest *industry* service; that employee will upon arrival be the most "plant senior" temporary, and thus will have the first opportunity to secure work for 45 weeks in a calendar year. In sum, acquisition of "permanent" status (through 45 weeks' work in a calendar year) is determined strictly by seniority: plant seniority in the first instance, and industry seniority if no temporary has plant seniority.

Of course, because employment opportunities will vary from plant to plant, it is possible that an employee assigned to one plant will achieve permanent status ahead of a more industry-senior employee assigned to another plant. But this possibility results *not* (as the court below thought) because the determination is based upon some factor other than cumulative length of service, but rather because cumu-

for an extended period. This agreement provides that a temporary employee loses his *industry* service (*viz.*, loses his status as a "temporary" employee) if he fails to work anywhere in the industry for a year. (A. 29). Thus, a temporary employee who elected not to seek employment anywhere in the industry for a year would break service. The agreement provides that a temporary employee loses his *plant* service if he declines an opportunity to be recalled to that plant after having been laid off and having secured employment at another plant (*viz.* if he elects to stay at the new plant rather than return to the old). (A. 32.)

lative length of *plant* (rather than industry) service is the first determinant of who secures opportunities to work.[14]

The court below recognized (585 F.2d at 426, n. 10), that § 703(h) protects plant seniority systems as fully as industry seniority systems. But it apparently overlooked the fact that plant seniority is the first determinant of the order in which temporary employees will achieve "permanent" status.[15] Thus, even if the court below were correct in its

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[14] Indeed, the agreement here accords length of service a *greater* role than is customary in American industry. If each of the breweries had been covered by a separate agreement, pure chance (and not seniority) would have determined which employees secured employment at which plants, and which, therefore, were fortunate enough to secure employment at the plant with the greatest work opportunities. Here, because industry service governs the assignment of employees to plants, the most industry-senior temporary employee awaiting assignment will always be referred first, thus obtaining a better chance to secure 45 weeks in a calendar year than the less industry-senior temporaries awaiting assignment.

[15] The court below thought the system here more susceptible of discriminatorily motivated "manipulation" than those which *it* defined as "seniority systems" (585 F.2d at 427.) In fact, the opposite is true. (See n. 14, *supra*.)

In any event, susceptibility to manipulation is irrelevant to determining whether a system is a "seniority system" within the meaning of § 703(h). If an employer or union engages in an act of "manipulation," that is an independent violation of Title VII which can be adjudicated, and remedied, independently of the status of the system under § 703(h). (*Franks, supra,* 424 U.S. at 758.) And if the employer and union construct a seniority system for the *purpose* of facilitating manipulation, the system will be a "seniority system" within the meaning of § 703(h) but will lack protected status thereunder by virtue of the proviso withholding that protection from discriminatorily motivated seniority systems. (*Hardison, supra,* 432 U.S. at 82, quoted at p. 2 *supra*.)

holding that cumulative length of service is the indispensable requirement for § 703(h) purposes) the simple fact is that the system involved in this case met that criterion.[16]

III. The Proper Disposition of This Case

There remains the question of the proper disposition of this case. The district court granted motions to dismiss under Rule 12(b)(6). That disposition was improper, for the complaint, construed most favorably to the plaintiff, alleged that the seniority system was discriminatorily motivated. If that is proven, the seniority system would be outside the protection of § 703(h) because of the proviso thereto. (See *Hardison, supra,* 432 U.S. at 82, quoted at p. 2, *supra*.) The Court of Appeals' error was to hold that the agreement did not establish a "seniority system," thereby relieving the plaintiff of the need to prove bad motive. The judgment of the Court of Appeals should therefore be reversed and the cause remanded to the district court with directions to allow the plaintiff to attempt to so prove.

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[16] Ultimately, the unhappiness of the court below flowed from a different factor. That court lamented that because work opportunities in recent years have diminished, it is impossible for *any* employee, black or white, who has entered the industry in recent years to achieve permanent status. But this simply means that all those who *do* enjoy permanent status were employed in the industry prior to those who, because they came later, encountered the industry's decline. By definition, a system which awards preference (e.g., permanent status) to those who were hired first does not *violate* the "fundamental component" which the court below demanded—*viz.*, that longer cumulative service be preferred—it vindicates that "component."

CONCLUSION

For the above stated reasons the decision below should be reversed and the cause remanded as suggested in Part III above.

Respectfully submitted,

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APPENDIX

SHIPPING RULES—JUNE 16, 1978

Preamble

Every seaman seeking employment through the hiring halls of the Seafarers International Union of North America-Atlantic, Gulf, Lakes and Inland Waters District (hereinafter called the "Union") shall be shipped pursuant to the following Shipping Rules. Nothing Contained in these Shipping Rules is in any way intended to create any indemnity obligation on the part of either the Union or the Seafarers Welfare Plan.

1. Seniority

A. Subject to the conditions and restrictions on employment contained in agreements between the Union and contracted Employers and to the Rules set forth herein, seamen shall be shipped out on jobs referred through the Union's hiring halls according to their class of seniority rating.

B. The following shall be the classes of seniority rating:

1. Class "A" seniority rating, the highest seniority rating, shall be possessed by:

(a) all unlicensed seamen who possessed such rating on Sept. 8, 1970, pursuant to the Shipping Rules then in effect;

(b) all unlicensed seamen who possess Class "B" seniority rating pursuant to these Rules and who have shipped regularly as defined herein for eight (8) consecutive years, provided such seamen have maintained their Class "B" seniority rating without break and provided further that they either have completed satisfactorily the advanced course of training then offered by the Harry Lundeberg School of Seamanship for the Department in which such seamen regularly ship or possess a rating other than Entry Department ratings specified in Rule 3A; and

(c) all unlicensed seamen who have been upgraded to

Class "A" seniority rating by the Seafarers Appeals Board pursuant to the authority set forth herein.

2. Class "B" seniority rating, the second highest seniority rating, shall be possessed by:

(a) all unlicensed seamen who possessed such rating on Sept. 8, 1970 pursuant to the Shipping Rules then in effect:

(b) all unlicensed seamenwh o possess Class "C" seniority rating pursuant to these Rules and who have shipped regularly as defined herein for two (2) consecutive years; and

(c) all unlicensed seamen who possess Class "C" seniority rating pursuant to these Rules and who have graduated from the Harry Lundeberg School of Seamanship entry rating training program and have been issued a ship assignment in accord with these Rules.

3. (a) During any period of emergency unlicensed seamen who have made application for entry rating training at the Harry Lundeberg School of Seamanship and who are awaiting acceptance for such school and who have successfully completed the prescribed special entry program, may be assigned a seniority classification of "C-Plus".

(b) Class "C" seniority rating the lowest seniority rating, shalle be possessed by all unlicensed seamen who do not possess either Class "A", Class "B" or Class "C-Plus" seniority ratings.

C. A seaman shall be deemed to have shipped regularly within the meaning of these Rules if he has been employed as an unlicensed seaman no less than ninety (90) days during each calendar year aboard one or more American-flag merchant vessels covered by a collective bargaining agreement between the Union and the owner or operator of such vessels.

D. Employment by or at the request of, or election to any office or job in, the Union shall be the equivalent of covered

employment described in the preceding paragraph; and seniority credit under these Rules shall accrue during the period that such employment, office of job is retained.

E. Seniority credit shall be accrued on the basis of total covered employment, without regard to whether such employment was served in the Deck, Engine or Steward Departments.

F. The ninety (90) day period of employment required of a seaman during any year to constitute shipping regularly within the meaning of these Rules shall be reduced proportionately in accord with the amount of time spent by such seaman during that year as a bonafide in- or out-patient in the continuing care of a U.S.P.H.S. or other accredited hospital. (For example, four (4) months in-patient time during a given calendar year reduces the ninety (90) day employment requirement for that year by one-third to sixty (60) days.

G. In the event a seaman possessing less than Class "A" seniority rating fails to ship regularly within the meaning of these Rules during a particular year, he shall lose all accumulated employment credit for that and all preceding years in his then current seniority rating.

H. In the event a seaman's covered employment has been interrupted by circumstances beyond his control, resulting in his failure to ship regularly within the meaning of these Rules, the Seafarers Appeals Board may, upon application of the affected seaman, grant such total or partial seniority credit for the time lost as the Board may deem necessary in its sole discrtion to avoid undue hardship.

I. In the event a seaman's covered employment is interrupted by service in the Armed Forces of the United States, resulting in his failure to ship regularly within the meaning of these Rules, such seaman shall suffer no loss of seniority credit accrued prior to his entry of military service if he registers to ship pursuant to these Rules within one hundred

twenty (120) days following his separation from military service.

2. Shipping Procedure

A. Subject to the specific provisions of these Rules, unemployed seamen shall be shipped only if registered as provided herein and in the order of the priorities established in Rule 2 C (3) hereof.

B. The following rules shall govern the registration of unemployed seamen for shipping through Union hiring halls:

1. Unemployed seamen shall register only at the port through which they desire to ship. No seaman shall be registered at more than one port at the same time, nor if they are employed aboard any vessel.

2. All seamen possessing U.S. Coast Guard endorsements, verifying certified deck or engine ratings, shall be registered in Group I or Group II of their respective Departments. In the Steward Department, seamen shall be registered in Group I-S, I or II upon presentation of their seniority identification card and providing proof of qualification for such registration. All other seamen who possess Class "A" or "B" seniority ratings shall be registered as "Entry Ratings" as defined in Rule 3, Departments and Groups and may bid for any job in the "Entry Ratings" Department. All other seamen who possess Class "C" seniority ratings shall be registered as "Entry Ratings", as defined in Rule 3, Departments and Groups, and may register for only one Department, to wit, Deck (Ordinaries on Watch, O.S. Deck Maintenance); Engine (Wiper, General Utility Deck/Engine); and Steward (Utility Messmen, Waiters, Messman, General Steward's Utility). Upon attaining endorsements from the U.S. Coast Guard of certified ratings, in the Group I or II category, in either the Deck or Engine Department as defined in Rule 3, Departments and Groups, or having sailed in the Steward Department for a minimum of six (6)

months, application may be made to the Seafarers Appeals Board for consideration for permanent registration in the Deck, Engine or Steward Departments.

3. Shipping registration cards shall be non-transferable and shall be issued at Union hiring halls only upon application in person by seamen desiring same. However, resident seamen at the Seafarers International Union Alcoholic Rehabilitation Center, Piney Point, Maryland who are not registered at a port prior to arrival at the Center may be registered at the port of their choice upon arrival at the Center. Shipping registration cards shall be time and date stamped when issued and shall show the registrants class of seniority rating, Department and Group.

4. Shipping registration cards shall be issued during the regular business hours of the Union's hiring halls. Every seaman desiring to register must possess and submit all documents required by the United States Coast Guard and by applicable law for employment as a merchant seaman aboard U.S.-flag vessels, and, in addition, a valid, current United States passport or evidence that a United States passport has been applied for within two (2) weeks of the date of registration. At the time of registration each seaman is responsible for producing sufficient evidence to establish his class of seniority rating. For this purpose an appropriate seniority identification card issued by the Union shall be deemed sufficient, although other official evidence of employment, such as legible U.S. Coast Guard discharges, may also be submitted.

5. In ports where the Seafarers Welfare Plan maintains a clinic, no seaman shall be registered for shipping unless he submits a valid Seafarers Welfare Plan clinic card at the time of registration.

6. To remain valid, seniority registration cards must be stamped once each month in the port of issuance. The dates and times for such stamping shall be determined by the

Port Agent for each port, and each registrant shall be notified of the dates and times for stamping when he receives his shipping registration card. A seaman who fails to have his shipping registration card so stamped during any month shall forfeit the same and shall be required to re-register. In the event circumstances beyond his control prevent a seaman from having his shipping registration card so stamped, the Port Agent may stamp such card as if the seaman had been present on the required time and date, upon submission by the seaman of adequate evidence to the circumstances preventing his personal appearance.

7. Subject to the provisions of these Rules, shipping registration cards shall be valid only for a period of ninety (90) days from the date of issuance. If the ninetieth (90th) day falls on a Sunday, a national or state holiday, or on a day on which the Union hiring hall in the port of registration is closed for any reason, shipping registration cards which would otherwise expire on such day shall be deemed valid until the next succeeding business day on which the said hiring hall is open. Shipping registration cards' periods of validity shall also be extended by the number of days during which shipping in the port of registration has been materially reduced by strikes affecting the maritime industry generally or by other similar circumstances.

C. The following Rules shall govern shipping of registered seamen through Union hiring halls:

1. Seamen shall be shipped only through the hiring hall at the port where they have registered for shipping. No seaman shall be shipped on a job outside of the Department or Group in which he is registered except under emergency circumstances to prevent a vessel from sailing short-handed, or as otherwise provided in these Rules.

2. Jobs referred to the Union riring hall shall be announced and offered to registered seamen at the times and according to the procedures set forth in Rule 4 hereof. At

the time each job is so offered, registered seamen desiring such job shall submit their shipping registration cards, U.S. Coast Guard Merchant Mariner's documents, and valid Seafarers Welfare Plan clinic cards to the hiring hall, dispatcher. Registration cards of seamen at the Seafarers International Union Alcoholic Rehabilitation Center, who have been registered in accordance with Rule 2.B.(3), as amended, and are certified as ready for employment, shall be considered along with the registration cards of seamen who are present in the hiring hall at the time the job is called. The job so offered shall be awarded to the seamen in the appropriate Department and Group possessing the highest priority, as determined pursuant to Rule 2.C.(3) hereof.

3. Within each Department, seamen of higher seniority rating shall have priority for jobs over seamen of lower seniority rating, even if such higher seniority seamen are registered in a different Group from that in which the offered job is classified. As between seamen of equal seniority ratings within the same Department, priority shall be given to the seamen registered for the Group in which the offered job is classified. In the event seamen of equal priority under this paragraph bid for the same job, the job shall be awarded to the seaman possessing the earliest dated shipping registration card.

4. Notwithstanding any other provisions of these Rules, no job shall be awarded to a seaman who is under the influence of alcohol or drugs at the time such job is offered; nor shall any seaman be awarded any job unless he is qualified therefor in accord with law or unless he submits, if necessary, appropriate documents establishing such qualifications.

5. The seaman awarded a job under Rule 2C(2) hereof shall immediately surrender his shipping registration card and shall receive two (2) job assignment cards containing his name and the details of the job. When reporting aboard his vessel, the seaman shall present one (1) job assignment

card to the head of his Department and the other to the Union department delegate.

D. A seaman who quits or is fired from a job during the same day on which he reports for such job shall retain his original shipping registration card if he has received no compensation for such day's employment and if he reports back to the dispatcher on the next succeeding business day. A seaman who quits or is fired after the day he reports for a job shall secure a new shipping registration card.

E. A seaman who receives job assignments pursuant to Rule 2.C.(5) hereof and subsequently rejects or quits the same on two (2) occasions within the period of his shipping registration card's validity shall forfeit his shipping registration card and shall secure a new shipping registration card.

F. All seamen registered for shipping, other than those possessing Class "A" seniority rating, who are unavailable to accept or fail or refuse to accept three (2) jobs for which they are qualified during any one (1) period of registration may forthwith be refused the right to register for employment under these Rules for a period of twelve (12) months. Upon application as provided in these Rules the Seafarers Appeals Board may shorten or revoke such refusal of registration for good cause shown.

G. (a) Seamen with Class "C-Pluss" seniority rating shipped pursuant to these Rules may retain such jobs for one (1) round trip or ninety (90) days whichever is longer. At the termination of such round trip or on the first opportunity following the ninetieth (90th) day on the job, such seaman shall sign off their vessels, and the vacant job shall be referred to the Union hiring hall.

Any seaman possessing Class "C-Plus" seniority, who fails to remain aboard an assigned vessel for a minimum of ninety (90) days shall subsequently be classed as "C seniority rating, except where his employment has been interrupted by circumstances beyond his control.

(b) Seamen with Class "C" seniority rating shipped pursuant to these rules may retain such jobs for one (1) round trip or sixty (60) days whichever is longer. At the termination of such round trip or on the first opportunity following the sixtieth (60th) day on the job, such seaman shall sign off their vessels, and the vacant job shall be referred to the Union hiring hall.

H. Seamen with Class "B" seniority rating shipped pursuant to these Rules may retain such jobs for a period of one (1) round trip or one hundred eighty (180) days, whichever is longer. At the completion of such round trip or at the first opportunity following the one hundred eightieth (180th) day on the job, such seamen shall sign off their vessels; and the vacant job shall be referred to the Union hiring hall.

I. The provisions of Section G and H of this Rule 2 shall not apply if they would cause a vessel to sail short-handed. For the purposes of these sections the phrase, "round-trip," shall have its usual and customary meaning to seamen, whether such "round-trip" be coastwise, intercoastal or foreign. On coastwise voyages, if a vessel is scheduled to return to the area of original engagement, a seaman of less than Class "A" seniority rating shall not be required to leave such vessel until the vessel reaches the said area. On intercoastal and foreign voyages, if a vessel pays off at a port i nthe Continental United States other than in the area of engagement, and if such vessel is scheduled to depart from said port of payoff within ten (10) days after arrival to return to the area of original engagement, a seaman of less than Class "A" seniority rating shall not be required to leave the vessel until it arrives in the area of original engagement.

J. No seaman shipped under these Rules shall accept a promotion or transfer aboard ship unless there is no time or opportunity to dispatch a seaman to fill such vacant job from a Union hiring hall.